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ARGUMENT

BEFORE THE

HON. J. D. COX,

Secretary of the Interior,

SHOWING THAT THE ACT OF 1866 HAS NOT REPEALED THE RIGHT OF

The Central Branch Union Pacific

RAILROAD COMPANY,

Under pre-existing laws to continue and extend its road to the "Main
Trunk" (The Union Pacific R. R.) as one of the Branches thereof.

BY EFFINGHAM H. NICHOLS,

Counsellor-at-Law.

NEW YORK:

EVENING POST STEAM PRESSES, 41 NASSAU STREET.

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JOINT RESOLUTION,

Relating to the Central Branch Union Pacific Rail Road Company.

RESOLVED, *By the Senate and House of Representatives of the United States of America, in Congress assembled,* That nothing contained in the Act of Congress approved July 3d, 1866, relating to the Union Pacific Railway, Eastern Division, shall deprive the Central Branch Union Pacific Railroad Company, (Assignee of the Hannibal and St. Joseph Railroad Company), of its right to continue its Road westerly from the termination of the One Hundred Miles specified in the Act of Congress incorporating the Union Pacific Railroad Company approved July 1st, 1862, to a connection with the Union Pacific Railroad as one of the branches thereof; but said Central Branch Union Pacific Railroad Company shall continue its road Westerly from the termination of the one hundred miles aforesaid, to a connection with the Union Pacific Railroad, at the hundredth Meridian of Longitude, upon the same terms and conditions in all respects as are now provided for the construction of the Union Pacific Railroad. And in case said Company shall deem it desirable, it may construct its road so as to connect with The Union Pacific Railroad at any nearer point East of the hundredth meridian of Longitude, and in either case it shall be entitled to bonds and lands for the number of miles which shall be actually constructed, and no more.

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ARGUMENT

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BEFORE THE HON. J. D. COX.

Secretary of Interior.

On a previous occasion we laid before the Hon. Secretary the claim of the Central Branch Union Pacific R. R. Co., under and in pursuance of the provisions of the Pacific Railroad Laws of 1862 and 1864, to continue and extend its road to a connection with the Union Pacific (the Main Trunk) at the one hundredth meridian of longitude west from Greenwich, and for and in aid of the construction thereof, to receive Lands and Bonds from the United States. The arguments advanced were so plain, and the law so clear, as not to be gainsaid.

The result, as we are informed, is that no doubt is now entertained of the *right* of the Central Branch Co., to thus extend its road, so far as the acts of 1862 and 1864, are concerned. The only question that remained for consideration, was whether the act of 1866, had, in any way, *divested* this *right*. Upon this we desire to submit the following in addition to what has already been said.

This question is to be determined by well established principles of law. It can be determined in no other way. In order to show that the *right* of the Central Branch to continue and extend its road has been *divested* by the act of 1866, it is necessary to maintain one of the two following propositions.

FIRST.

That the act of 1866 by *its terms* repeals the right of the Central Branch Co. to continue and extend its road under the provisions of the acts of 1862 and 1864, or

SECOND.

That the act of 1866, is *so inconsistent with* and *repugnant to* the *right* of the Central Branch Co. to continue and extend its road under the provisions of the acts of 1862 and 1864, that it repeals that right *by implication*.

An examination of the act of 1866, at once shows, that the *former* of these propositions cannot be maintained. It contains no *direct* repeal of the right claimed for the Central Branch Company, and does not by *its terms* allude to that Company nor to any of the provisions under which the right to continue and extend that road is claimed.

The *second* proposition relates to what is known in law as *repeal by implication*. Upon this subject the decisions are uniform. To maintain a repeal by implication, it must be clearly shown that the two acts are not only *inconsistent* with, but *repugnant* to each other. There is no doctrine or principle of law set forth in the books with so much clearness and uniformity as this.

These words, *inconsistent*, and *repugnant* are strong words, and especially the latter, which is derived from the Latin *repugnare* to fight against; freely translated, hostile, inimical, totally irreconcilable with, in direct opposition to, *not capable of co-existence*.

The decisions upon this subject are a repetition of each other. The following are sufficient to shew their uniform character.

"The earlier of two acts remains in force if not expressly repealed, unless the two acts are *inconsistent* and *repugnant*."

N. Y. Supreme Court, Van Renselaer v. Snyder, 9 Barb. 302.

"That repeals by implication are things *disfavored* by the law, and never allowed of but where *inconsistency* and *repugnancy* are plain and unavoidable."

(19 Vin. Abr. 525, p. 132.)

McCartee v. Orphan Asylum Society, 9 Cow. N. Y., 437.

To the same effect, N. Y. Com. Pleas, 1855, citing also, Dwar. 674, 9 Barb., 268 302. Mayor, &c., of New York v. Walker, 4 E. D. Smith, 258.

"Repeal by implication is *not favored*, and the earlier statute remains in force unless the latter is manifestly *repugnant* to it, and *inconsistent* with it, or unless the latter act takes some notice of the former, plainly indicating an intention to abrogate it." Supreme Ct., 1843, Bowen v. Linse, 5 Hill, 225. (Citing also, 9 Cow. 506,) Williams v. Potter, 2 Barb., 316. N. Y. Com. Pl., 1857, People v. Deming, 1 Hill, 271. S. C., 13 How. Pr., 441.

"In regard to the mode in which laws may be repealed by subsequent legislation it is laid down as a rule, that a general statute without negative words, will not repeal the particular provisions of a former one, unless the two acts are *irreconcilably inconsistent*. The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as

"intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." Sedgwick on Statutory Law, page 123.

"When two statutes are so flatly repugnant that both cannot be executed, and we are obliged to choose between them, the later is always deemed a repeal of the earlier. This rule applies with equal force to a case of absolute and irreconcilable conflict between different sections or parts of the same statute, but whenever two acts can be made to stand together, it is the duty of the Court to give them full effect." Brown vs. County Com., 21 Penn., 37.

"But if both acts be merely affirmative, and the substance such as both may stand together, here the latter does not repeal the former, but they shall both have a current efficacy." 11 Co. Rep., 63. 1 Bl. Comm., 89 and 90.

But, though it is thus clearly settled that statutes may be repealed by implication and without express words, still, as has already appeared, the leaning of the Courts is against the doctrine, and against entertaining any repeal whatever by implication, if it be possible to reconcile the two acts of legislation together.

"It must be known (says Lord Coke), that forasmuch as acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent act, to be abrogated." In this country, on the same principle, it has been said that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, and it is, therefore, but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable, and hence a repeal by implication is not favored, on the contrary, courts are bound to uphold the prior law, if the two acts may well subsist together."

Bowen vs. Lease, 5 Hill, 221,

Canal Co. vs. R. Road Co., 4 Gill & John, 1.

In Pennsylvania "repeals by implication are not favored. One act of Assembly is held to repeal another by implication, only in cases of very strong repugnancy or irreconcilable inconsistency."

Street vs. Commonwealth, 6 W. & S. 209.

Commonwealth vs. Easton Bk., 10 Barr, 442.

Brown vs. Connty Commis. 21 Penn., 37.

In New York, the "repeal of a statute by implication is not favored, unless the latter statute is manifestly inconsistent with and repugnant to the former, both remain in force. Courts are bound to uphold the prior law, if the two may subsist together."

Williams vs. Potter, 2 Barb., S. C. R. 316.

In Massachusetts, "to annul the prior statute, the latter act must be clearly repugnant to the former, and repeals by implication are not favored."

Commonwealth vs. Herring, 6 Cushing, 465.

"One statute is not to be construed as a repeal of another if it be possible to reconcile the two together."

McCool vs. Smith, Black S. C. U. S. Rep., pge. 459.

"Where *rights are infringed*, where fundamental principles are overthrown, "where the general system of the laws is departed from, the legislative intention "must be *expressed with irresistible clearness* to induce a Court of Justice to suppose "a *design to effect such objects*."

Fisher vs. Blight, 2 Cranch, S. 8, C. U. S. Reports, page 390.

We will close these references to decisions by citing the following:

"A construction which repeals another statute should be very clear, especially "when the repeal is of part of a statute and it seriously *mars the harmony of a system*."

Hays vs. Symonds, 9 Barb., 260.

"One part of the statute must be so construed by another that the *whole* may, "if possible, stand. *Ut res magis valeat quam pereat*."

Tomlin's Law Dictionary, page 522.

"Statutes made for the *public good* are to be expounded so as to attain their end." I Stra. 253, 258.

"Such statutes as are *beneficial to the people* shall be expounded *largely* and *not with restriction*."

Style 302.

"A statute made for the accommodation of a *particular* citizen or *corporation* ought not to be construed to affect the rights or privileges of *others*, unless such "construction results from *express words* or *necessary* implication."

Coolidge vs. Williams, 4 Mass., 140.

Mr. Justice Story, in speaking of the earlier of two statutes, says: "That it "has not been expressly or by direct terms repealed is admitted, and the question "resolved itself into the more narrow inquiry, whether it has been repealed by *necessary* implication. We say *necessary* implication, for it is not sufficient to "establish that subsequent laws cover some or even all of the cases provided for "by it, for they may be merely affirmative or cumulative or auxiliary. But there "must be a *positive repugnance* between the provisions of the new law, and those "of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnance."

Wood vs. U. S., 16 Peters U. S. Rep. 362 and 363.

"The repeal of a law by implication and construction of a subsequent Statute, "should be so clear as to leave no reasonable doubt that such was the intention "of the Legislature. It *should not* be deduced by an *ingenious course of argument*, "but should *appear at once*." E. Dist. of Pa., 1840, United States v. Twenty-five cases of Cloth, Crabbe, 356.

It will be observed that the mere want of consistency is not sufficient. *Both inconsistency and repugnancy* must exist.

The two statutes must be *both inconsistent with and repugnant* to each other.

Let us sum up this law. The earlier of two statutes is repealed by implication only when the two are *inconsistent with and repugnant to each other*; when the two are so *flatly repugnant* that *both cannot be executed*; when an *absolute, irreconcilable conflict* exists between the two. But, even then, repeals, by implication, *are not favored by the Courts*; on the contrary, Courts are *bound to uphold the prior law*, if it be possible, and especially where such repeal would *mar the harmony of a system*, so that the *unity and integrity* of the *original design* may remain, so that the *public good*, that the statutes under consideration had in view, *may be attained*, and so that *these statutes, being beneficial to the people, shall be liberally expounded*.

In short, the two statutes must be *so inconsistent with, and so repugnant to each other* that the later *ex necessitate* repeals the earlier.

I. Now it cannot be maintained that the Act of 1866 is *inconsistent with and repugnant to* the right of the Central Branch Company to continue and extend its road under the Acts of 1862 and 1864, for the reason that there is no *conflict, contact or collision* between the two. The Act of 1866 simply gave the Eastern Division Company a *special privilege* to build in another direction, instead of constructing the road pointed out and designated by the Acts of 1862 and 1864. The original plan remained unchanged so far as the rights of other companies were concerned. All that the Act of 1866 can be *inconsistent with and repugnant to*, would be the exercise of the right on the part of the Eastern Division Company to construct a road over *both* routes. The Eastern Division Company might still have constructed their road over the original route, had they elected so to do. There was nothing in the Act of 1866 that *compelled* them to make a change. The Act of 1866 simply gave them the *individual right* to make a change if they chose to avail themselves of it. If they had not made any change the Act of 1866 certainly would not have repealed any pre-existing law. How can it, then, with any degree of gravity, be maintained that the

action of the Board of Directors of the Eastern Division Company in adopting the Smoky Hill route has had the effect of repealing provisions of law *affecting another company*? Or that the Act of 1866, *without alluding to the Central Branch Company* has *divested* that company of its right to continue its road as provided by the Act of 1864? But to return to the point we were considering. What is there in the construction of the Eastern Division Road, over the Smoky Hill route, thence up to Denver, and thence to a connection with the Union Pacific Road, "but not at a point "more than fifty miles westwardly from the meridian of "Denver," that is *inconsistent* with or *repugnant* to the continuation and extension of the Central Branch Road to a connection with the main trunk at the 100th meridian? What is there between statutes providing for the accomplishment of these ends—the *construction of these two branches*—that is so *flatly repugnant* that both cannot be executed? What *absolute and irreconcilable conflict* exists between these two statutes? The answer is, *there is none whatever either in fact or in law.*

Let us consider a moment, the effect of a repeal of a statute? "The effect of a repeal of a statute" says an eminent Judge, "I take to be to *obliterate* the statute repealed as completely "from the records of Parliament, as if it had never passed, "and that it must be considered as a law that never existed, "except for the purposes already accomplished." Now it is certainly incumbent upon whoever endeavors to maintain the *second* proposition—that the act of 1866 has repealed, *by implication*, certain pre-existing law, that he should put his finger upon it and point out the section and, the lines or line which have been thus repealed. It must be some portion of the acts of 1862 and 1864 that is *inconsistent* with, and *repugnant* to the act of 1866. Is it a section or part of a section, or a few words only? "Why (says one) it is the 16th section of "the act of 1864." The whole of it? "No." Which part of it? "Well, I cannot say what part of it, I cannot point out "the words, but what I mean to say, is, that I have a *vague* "*notion* that the act of 1866 is inconsistent with, and repugnant to the exercise, on your part, of your right under the

“acts of 1862 and 1864, to continue and extend *your road* to “a connexion with the Main Trunk at the one hundreth “Meridian.” To such we must reply. In what *particular* is the language or the theory of the act of 1866 *inconsistent* with or *repugnant* to those provisions of the acts of 1862 and 1864, which gave these rights? Can they not both be used together? Can they not both be executed? Cannot a road be built by The Central Branch Company, in continuation of its road to the one hundreth Meridian, and yet the Eastern Division avail themselves of the *special* and *individual* privilege given them under the act of 1866? Are they so repugnant—so hostile that one *wars* against the other, and that if both be permitted to stand, there will be an *unending conflict* as to which shall prevail? *The very reverse of this proposition is true.* The act of 1866 is consistent with, and *not* repugnant to the right of the Central Branch Company to continue and extend its road to a connexion with the Main Trunk at the one hundreth Meridian. This proposition is not only true, because there is no conflict, no contact, no collision between the two, but because, in the language in one of the cases cited, the reverse, “*seriously mars the harmony of a system.*” A more beautiful illustration of which latter idea could not be given, than is given in the *system* and *plan* of the Pacific Railroad, composed of its *Main Trunk* and *Branches*.

But, further, this proposition *is consistent with*, while the counter proposition would be *utterly inconsistent with* and *repugnant to* the titles not only of the acts of 1862 and 1864, but also to the title of the *act of 1866 itself*.

The Act of 1862, is entitled “An Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River “to the Pacific Ocean, &c.”

The Act of 1864 is entitled “An Act to amend an Act, entitled, ‘An Act to Aid in the Construction of a Railroad and “Telegraph Line from the Missouri River to the Pacific Ocean, &c,”

And the Act of 1866, itself is entitled “An Act to amend “an Act entitled, ‘An Act to amend an Act entitled an Act

“to aid in the Construction of a Railroad and Telegraph Line
“from the Missouri River to the Pacific Ocean, &c.”

All these titles imply an *entirety*, a *oneness*, a *unit*, and any construction that is inconsistent with or repugnant thereto is inconsistent with, and repugnant to, the *declared intent* of the law.

A like remark also applies to any construction that is inconsistent with that *entirety* and *oneness*, which is implied in the oft repeated terms “*Main Trunk*” and “*Branches*.”

It will also be observed that the several acts are “to aid in the construction of a railroad, &c.,” and the fair presumption is that each subsequent statute was intended to *still further aid* the object in view, instead of *to withdraw* aid already pledged.

Again, the track upon the entire line of railroad and branches is of uniform width, viz. : of 4 feet 8½ inches. This the law and contract required. The reason given, in the law and contract, was “so that when completed cars can be run from the “*Missouri River to the Pacific coast*.” Surely there is nothing in the Act of 1866, that is inconsistent with or repugnant to this requirement, or the reason given therefor.

Again, “The *whole line* of said *Railroad* and *Branches* and “*Telegraph* shall be operated and used for all purposes of communication, travel and transportation, so far as the public and “government are concerned, as *one connected, continuous line*.” The words “*whole line*” imply, as before, a *unit*, but what shall be said of the words “*one connected and continuous line*”? How can a construction adverse to us be reconciled with this? Can this word “*connected*” be made to harmonize and agree with the chopping off this *branch* from the *main trunk*,—and while it lies detached from the main trunk, and distant therefrom 230 miles, shall it be said that this *is consistent with* and *not repugnant to* the words “*one connected continuous line*”? Again, “If said “roads are not completed so as to form a *continuous line* of railroad ready for use from the Missouri River to the Navigable “waters of the Sacramento River, in California, by the first “day of July, 1876, the whole of all the said Railroads, before “mentioned, and to be constructed under the provisions under “this Act, together with all the furniture, fixtures, rolling stock “machine shops, lands, tenements and hereditaments and pro-

“perty of every kind and character *shall be forfeited to*, and “taken possession of, by the United States.” What! deprive us of the power of completing our road so as to form a continuous line, and then forfeit our entire property because we have not completed it!! True, this provision has been since modified but that does not alter the principle involved.

It seems unnecessary to further pursue, and point out these *grand general features* of the Pacific Railroad, which so loudly proclaim the *unity*, the *oneness*, and the *integral character* of the enterprize. A Statute which is to deprive us of the benefit of all these provisions, must of necessity be *direct* in its terms, and its language *clear*, and *unequivocal*. To assume that such a result can follow from implication, without *testing* it by the established *principles* which govern such cases, would be *contrary to law*—while at the same time it is assuming a conclusion that is inconsistent with the *plighted faith* of Congress and the *honor* and *dignity* of the Government.

In the case of *Thornhill vs. Hall*, 2 Clark and Finnelly’s House of Lords cases, p. 36. Lord Chancellor Brougham in delivering the opinion of the Court, announces *the general rule of construction* in this strong and emphatic language, and it is equally applicable to the expressed *will* of the testator, which was the subject of construction *then*, and to the expressed *will* of the legislature, which is the subject of construction *now*.

“I hold it to be (said he,) a rule that admits of no exception “in the construction of written instruments, that where one “interest is given, where one estate is conveyed—where one “benefit is bestowed in *one* part of an instrument by terms “clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man “breathing, be he lawyer, or be he layman, could entertain a “doubt—in order to reverse that opinion, to which the terms “would of themselves and standing alone have led, it is not “sufficient that you should raise a *mist*, it is not sufficient that “you should create a *doubt*, it is not sufficient that you should “show a *possibility*, it is not even sufficient that you should “deal in *probabilities*; but you must show something in *another* “part of that instrument, which is as decisive, the one way, as “the other terms were decisive the other way, and that the in-

"terest *first given* cannot be *taken away*, either by *tacitum*, or by *dubium*, or by *possibile*, or even by *probabile*, but that it must be taken away, and *can only* be taken away by *expressum et certum*."

II. But the act of 1863 is *not only* not inconsistent with, nor repugnant to our right, but on the other hand is *confirmatory thereof*.

The act of 1862 laid down the *plan* of the Pacific Railroad, and assigned to different companies the *parts* which they were to construct. It was deficient, however, in not providing against the *failure* of any of these companies to *construct the portion assigned to it* of a continuous line from *each* of the points designated on the Missouri river to the Pacific Coast. The act of 1864 not only remedied this, by providing that in the event of any company *failing* to construct the part or portion assigned to it, and which was *necessary to form a continuous line* from *any* of the points designated on the Missouri river to the Pacific coast, that any other company on the completion of its road, should not only be *authorized* but *entitled* to continue and extend its road until a connection was formed; but the act of 1864 said to each of the corporations, in substance, "*proceed now with your part* of this undertaking; mind your own business; the *failure* of any *other* company to fully comply with the act of 1862, and this act of 1864, shall not work a forfeiture of *any of the rights or privileges* which you have under these laws." Now under this act of 1864 the right of the Central Branch Company to continue and extend its road, was *contingent* upon the *failure* of the company having the *prior* right to complete the portion assigned to it under that act. But the act of 1866 comes in and renders that *absolute* and *certain*, which was before *contingent*. The right of the Central Branch to extend its road, became *absolute* and *certain*, so soon as the Eastern Division Company availed itself of the *special provision* given to it by the act of 1866, and elected to adopt the Smoky Hill route, and the time for building the portion of the road originally assigned to it had expired. So that the act of 1866, so far from being *inconsistent with* or *repugnant* to the right of the Central Branch Company to continue and extend its

road is *confirmatory* of that right. *In fact the effect of the act of 1866 has been to render the Eastern Division Branch an independent branch, while at the same time it has had the effect of removing the only contingency that stood in the way of the independence of the Central Branch.*

☞ In the *practical working* and *effect* of the act of 1866, you will find the *key* that unlocks the law itself, and reveals the fact that the act of 1866 works in *perfect harmony* with the acts of 1862 and 1864—that the *unity, oneness and integrity* of the original design still stand—that it is still *a railroad composed of a trunk and branches*—that the *titles* of the several acts are still *consistent and true*—that all those *grand general provisions* which were so well designed and intended for the regulation of this great road as a *unit*, are still applicable to *each and every part* thereof as parts of “*one connected continuous line*”—and that while the effect of the act of 1866 has been to render the Eastern Division Branch an *independent branch*, it at the same time has removed the *only contingency* that stood in the way of the *independence* of the Central Branch.

III. There is one other view of this case to which we desire to call attention. The acts of 1862 and 1864, were in the nature of *propositions* to the different companies named therein, and so soon as those companies, each for itself, accepted those propositions and *performed* the conditions on their part severally and respectively, *a complete and binding contract* resulted between each of the companies *so performing* on the one part and the Government on the *other*. These contracts though embraced in the same instrument, and together designed to accomplish one end, were yet *separate and distinct*. They contained pledges and promises. These pledges and promises were intended to allure and attract *other* capital to be used for the accomplishment of the same purpose. The contract with the Central Branch Company provided among other things that in case any other portion of the road, then designated, and then forming or intended or necessary to form a portion of a continuous line from Atchison on the Missouri river, to the Pacific coast, should not be constructed within a

given time, that the Central Branch Company should not thereby be deprived of the benefits of a connection, but upon *performance* of its part of the undertaking; to wit, upon the completion of its road "*shall be entitled* to and is hereby authorized to continue and extend" the same until a connection is formed, "and for, and in aid thereof *shall be entitled* to similar and like grants, &c." In pursuance of this contract the Central Branch Company advanced the necessary capital and completed its portion of the road; and in accordance with the terms of the contract (another portion of the road necessary to form a continuous line from Atchison, not having been constructed within the time required), the Central Branch Company became not only authorized but "*entitled*" to continue and extend its road, and "*entitled*" to similar and like grants, &c. Mark the word "*entitled*." If we have the *title*, we have "*justa causa possidendi id quod nostrum est*." Now this to which we are entitled is the result of *performance* on our part—we have acquired it by *purchase*—and it has become a *part of our assets*, upon which we justly rely to aid us in continuing our road. Our *title* thereto rests upon the *solemn pledge and promise of the Government*—a pledge and a promise that was made to us *to induce us to do what we have done*. It has, by *performance* and by the *expenditure of a large amount of money on our part* become a part of our *property*. Now, shall it be asserted that the American Congress has done that by *implication* which it has never yet done by a *direct law*, and which even the British Parliament, with the sovereignty of an unwritten constitution, has never dared to do, namely, deprive a subject of *property without due process of law or just compensation*? Such an act would be regarded among all enlightened people as contrary to *rectitude* and as opposed to the *primary principles of social alliance*.

Had we *not performed*, our relations with the Government might have been very different. The proposition which was made to us, even though accepted by us, as long as it remained in that form only, might perhaps have been withdrawn, but where there has been *not only an acceptance but a performance*, the case is vastly different. The *contract* has become *binding*

and irrevocable. The party *performing* has become "*entitled*" to the *benefits* thereof. He has acquired *property* therein—and of that property he cannot in this land be deprived without *due process of law* or *just compensation*.

The questions which surround a certain class of *personal rights and remedies*, as to how far they are *protected* against *legislative aggression*, do not apply to the case under consideration. This is a case of *defined* and *vested interests* in *actual property*, both *real* and *personal*, to which this company by *performance* has become "*entitled*."

A Legislative act, whether it be a positive enactment or a repealing statute, which takes from an individual *such rights* for any purpose (except where property is taken for public use and upon just compensation) is adjudged invalid as being *above* the *power* and *beyond* the *scope* of *legislative authority*. *Such rights* "rest not merely upon the Constitution but upon the "great principles of Eternal Justice which lie at the foundation "of all free governments."

When we embarked in this undertaking, Mr. Secretary, and intrusted to the *promises* of the Government our fortunes, some of us at least, after being satisfied that we might reasonably expect a fair return for our investment, were actuated by the higher motive that we should at the same time be doing something toward developing the internal resources of our country. No thought as to the *insecurity* of our *property* entered our minds. The idea that these *promises* might prove to be false lights and mislead us, was never thought of. We had always supposed that in dealing with the Government we should be dealt with *justly*. We supposed that the people of the United States erected their constitution to *establish justice*, to promote the general welfare, to secure the blessings of liberty, and to *protect* their persons and *property*. We supposed that security of personal liberty and the *protection* of *private property*, were the chief ends for which the Government was established.

We trusted the Government, and *we have not trusted in vain*. Congress could not deprive us of our *vested rights*, if they would. The decisions on this subject are clear; while at the same time there exists a strong and increasing disposition on

the part of the Judiciary to protect citizens against legislative attempts to invade the *sacredness* of *vested rights*. But Congress by the Act of 1866, has made no such attempt. If that law were to-day the subject of an argument on the ground of its being void for the want of Constitutional existence, the Court would meet us at once by saying, "You have mistaken your premises, the idea that the Act of 1866 *divests* your right, is *too far drawn*, and *too remote* to be entertained. If that is the subject of your argument we cannot hear you further."

We do not expect an *Executive* officer to take *Judicial* cognizance of the question, whether an act *is or is not constitutional* and *govern his action accordingly*. But we have referred to the point which we have considered, by reason of the *established rule of law*, that in the *construction of Acts of Congress* you are to *avoid all such implications*, (except where the language is direct in its terms) as are *contrary to the Constitution* or *opposed to the primary principles of Justice*, the presumption being that Congress never *intended* to exercise such authority.

An additional reason for not depriving this Company of the *benefits of that solemn and as yet unaltered contract*, in good faith entered into between it and the Government of the United States, will be found in an examination of the Act of March 3d, 1869, where the cunning hand that wrote the Act of July 3, 1866, is again so clearly manifest.

It plainly appears then

1st. That the act of 1866 has neither by *its terms*, nor by *implication* repealed the *right* of the Central Branch C continue and extend its road, and for and in aid of the construction thereof to receive lands and bonds from the United States :

2nd. That, on the contrary, the act of 1866 was *confirmatory* of that right; and

3rd. That the Eastern Division Company having adopted the Smokey Hill route, and the time having expired within which they were to have constructed their road upon the original route, the *right* of the Central Branch Company to continue and ex-

tend its road upon the terms and conditions set forth in the law and for and in aid thereof to receive lands and bonds from the United States, remained no longer a *contingent right*, but became, and now is, a *vested right*; of which it cannot be *divested* except by *due process of law*, or for *just compensation*: and the Act of 1866 not having divested this right by its *direct terms*, no one is at liberty to say that it has done *that* by *implication* which is *contrary to the Constitution*, and *opposed to the primary principles of Justice*.

The Honorable Secretary, mindful of his high obligation to faithfully discharge the duties of his office, will certainly not permit *vague notions* to usurp the place of *principles of law*. Lord Bacon is reported somewhere to have said that the human mind loveth rest, and that the judicial mind findeth it in rising to that higher plain where the *principles of law* are clearly seen. Those *principles* proclaim with *irresistible certainty* that the Act of 1866 has *not divested* the Central Branch Company of *the right* under consideration.

EFFINGHAM H. NICHOLS.

Gaylord

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